Chicago-Kent Law Review

Volume 88
Issue 1 *Methodological Approaches to Asian Constitutionalism*

Article 12

December 2012

Beyond the Schoolhouse Gate: Should Schools Have the Authority to Punish Online Student Speech?

Brittany L. Kaspar

BEYOND THE SCHOOLHOUSE GATE: SHOULD SCHOOLS HAVE THE AUTHORITY TO PUNISH ONLINE STUDENT SPEECH?

BRITTANY L. KASPAR*

INTRODUCTION

On October 24th, 2006, a high school sophomore came home from school and sat down at his home computer to instant message friends about music, TV shows, and classes - just as he did every other afternoon.[1] This particular afternoon however, a friend began repeatedly prodding the student about what type of guns he has access to and which fellow students he would kill if presented the opportunity.[2] The same friend immediately thereafter emailed excerpts of the conversation to their school principal.[3] Hours later, police showed up on the student's doorstep and took him into custody.[4] Despite the fact that this student did not have any history of threatening or violent conduct, school administrators eventually suspended him for the remainder of the school year.[5]

The essence of the issue in the aforementioned facts is not the existence of true peril presented by the student's statements, nor is it the legitimacy of the school's chosen form of discipline. Rather, focus should be placed on the student's complete lack of certainty regarding the permissibility of his online speech. At a bare minimum, every student is entitled to know whether or not a statement he communicates via the Internet while sitting in his own home will subject him to discipline at his school. Because the status of the law revolving around off-campus, online student speech is both obscure and antiquated, it is more than likely that the student in this case - and in countless other cases decided within the last several years - was oblivious to the fact that he could be punished for statements made on the Internet from the comfort of his home.

* J.D. Candidate, Chicago-Kent College of Law, 2013.

1. D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 757-58 (8th Cir. 2011).
2. *Id.* at 758.
3. *Id.* at 757.
4. *Id.* at 759.
5. *Id.* at 757-59.

Even before the advent of the Internet, both on and off-campus student speech jurisprudence was described as "complex, somewhat dissociative, and perhaps contradictory."[6] Now, however, the World Wide Web has "revolutionized communication, allowing people to converse instantaneously at the click of a button."[7] MySpace, Facebook, Twitter, YouTube, and various other social networking sites employ "'user friendly' interfaces, allow[ing] even the most casual of users to share up-to-the-minute personal information, photographs, and videos."[8] Today, over 87 percent of children between the ages of twelve and seventeen use the Internet, spending an average of twelve hours a week online.[9] This rapid rise in teen Internet use has resulted in an "explosion of student speech cases."[10] Indeed, "student speech cases are among the most commonly litigated cases under the First Amendment."[11]

Although the Supreme Court has issued four opinions on the permissibility of sanctioning student speech, each one deals with either speech occurring on-campus, or speech occurring during an off-campus, but school-sanctioned, activity.[12] Thus, the high Court has yet to address the permissibility of punishing students for off-campus, online speech.[13] As a result, lower courts have struggled to decide whether it is constitutional under the First Amendment for schoolteachers and administrators to discipline students for speech originating off-campus and on the Internet. On one hand, some courts side with the students, holding that the school's authority to sanction student speech does not extend off-campus and into the realm of the Internet.

6. Philip T.K. Daniel, *Bullying and Cyberbullying in Schools: An Analysis of Student Free Expression, Zero Tolerance Policies, and State Anti-Harassment Legislation*, 268 ED. LAW. REP. 619, 626 (2011).

7. Allison E. Hayes, *From Armbands to Douchebags: How* Doninger v. Niehoff *Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 247-48 (2010).

8. Benjamin T. Bradford, *Is It Really MySpace? Our Disjointed History of Public School Discipline for Student Speech Needs a New Test for an Online Era*, 3 J. MARSHALL L.J. 323, 324 (2010).

9. Hayes, *supra* note 7, at 247-48; Travis Miller, Doninger v. Niehoff*: Taking* Tinker *Too Far*, 5 LIBERTY U. L. REV. 303, 303 (2011).

10. Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 617 (2011). *See also* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 430 (2011) ("Student speech cases dominate courts' First Amendment dockets."); Hayes, *supra* note 7, at 247-48 ("This speech-enhancing medium has led to numerous controversies, causing its regulation to become a flashpoint in First Amendment jurisprudence.").

11. Goldman, *supra* note 10, at 396.

12. Hayes, *supra* note 7, at 271.

13. *Id. See* Stephanie Klupinski, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*, 71 OHIO ST. L.J. 611, 614 (2010).

However, a number of federal circuit courts have held in favor of schools, finding that the punishment is constitutional regardless of where the speech originated, as long as the speech caused a substantial disruption to the school environment. Legal scholars generally agree that "[b]ecause lower courts are in 'disarray' when defining school jurisdiction over online student speech, the issue is ripe for Supreme Court review."[14]

Part I of this comment discusses the First Amendment generally and the four Supreme Court cases that have refined its application with respect to on-campus student speech. Part II presents the ensuing circuit split over the constitutionality of disciplining students for online, off-campus speech. Specifically, this section will explain both of the existing perspectives and why neither of the two is ideal. Part III attempts to devise a solution to the current divide by advocating a compromise position. In particular, an analysis of the existing case law will demonstrate the ability of this proposal to balance longstanding First Amendment principles with the interests of school administrators.

I. HISTORICAL BACKGROUND

Since the days of the Vietnam War, the legal realm has attempted to discern exactly how far First Amendment protections extend with respect to student speech, basing its arguments on a telling history and few words in the constitutional text. A general understanding of the First Amendment will help shed light on the subsequent discussion of the existing Supreme Court cases from the past four decades that establish the nature and extent of student free speech rights.[15] Even though the challenged speech involved in all four of the cases occurred either at school or at a school-sponsored event, these cases provide instructive guidance with respect to the constitutionality of disciplining students for Internet speech.[16]

A. The First Amendment

While the text of the First Amendment to the United States Constitution states that "Congress shall make no law... abridging the free-

14. Joseph A. Tomain, *Cyberspace is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 102 (2010) (quoting Doninger v. Niehoff, 594 F. Supp. 2d 211, 224 (D. Conn. 2009)).

15. John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 102 (2011).

16. D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 760 (8th Cir. 2011).

dom of speech,"[17] the Amendment does not protect every expression without reservation.[18] The Supreme Court has, for example, declined to extend First Amendment rights to include true threats - statements that "would communicate to a reasonable person a serious intent to cause a present or future harm."[19] This special treatment is justified on the ground that the potential societal value of the threat is overshadowed by "the fear and disruption it engenders and the possibility that [it] will be carried out."[20] In addition to these wholly excluded classes of speech, some categories of speech contain qualified restrictions under certain circumstances. One of these limited classes is student speech in public schools.[21]

With this general First Amendment overview in mind, I will now turn to the four Supreme Court cases that explain the development of student speech jurisprudence as we know it today.

B. The Supreme Court Precedent

In 1969, the Supreme Court established an elevated[22] standard for student speech rights, "extend[ing] them well beyond traditional bounds."[23] In *Tinker v. Des Moines Independent Community School District*, the Court held that suspending a group of high school students who expressed their personal views by wearing black armbands to school as a way of protesting the Vietnam War was unconstitutional.[24] The decision "articulate[d] the two-pronged test that has since been used in countless student speech cases."[25] In order for school authorities to constitutionally punish student speech, the expression must either "substantially interfere with the work of the school or impinge upon the rights of other students."[26] In *Tinker*, the school's "mere desire to avoid the discomfort and unpleasantness that always accompa-

17. U.S. CONST. amend. I.

18. Kathy Luttrell Garcia, *Poison Pens, Intimidating Icons, and Worrisome Websites: Off-Campus Student Speech That Challenges Both Campus Safety and First Amendment Jurisprudence*, 23 ST. THOMAS L. REV. 50, 53 (2011). *See* Morse v. Frederick, 551 U.S. 393, 446 (2007) (Stevens, J., dissenting) ("Our First Amendment jurisprudence has identified some categories of expression that are less deserving of protection than others - fighting words, obscenity, and commercial speech to name a few.").

19. Goldman, *supra* note 10, at 411-12; Hayes, *supra* note 7, at 249.

20. Garcia, *supra* note 18, at 88.

21. *Morse*, 551 U.S. at 411 (Thomas, J., concurring).

22. Hayes, *supra* note 7, at 252.

23. *Morse*, 551 U.S. at 416 (Thomas, J., concurring).

24. 393 U.S. 503, 514 (1969).

25. Waldman, *supra* note 10, at 596.

26. *Tinker*, 393 U.S. at 509.

ny an unpopular viewpoint" was not sufficient to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."[27] The Court further cautioned that a mere "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[28]

Notwithstanding the majority's firm stance on the unconstitutionality of the school's action, Justice Black's dissent cautioned against the Court's holding: "If the time has come when pupils of state supported schools ... can defy and flout orders of school officials ... it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."[29] Perhaps partly in response to his concerns, the Supreme Court has gradually "scaled back *Tinker*'s standard" by refusing to apply the substantial disruption test to some student speech cases.[30] In particular, three subsequent cases have each established that *Tinker* is not the only test that applies,[31] thereby comprising a "patchwork of exceptions" to *Tinker*.[32]

About twenty years after *Tinker*, *Bethel School District v. Fraser* was the first of the three ensuing cases to signal "at least a partial break with *Tinker*."[33] In *Fraser*, a school suspended a student for delivering a speech before a high school assembly that contained "an elaborate, graphic, and explicit sexual metaphor."[34] Absent a manifest analysis under *Tinker*'s substantial disruption rule, the Court held that disciplining the student was nonetheless constitutionally permissible because "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[35] The Court reasoned, "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions ... The determination of what

27. *Id.* at 508-10. *See Morse*, 551 U.S. at 404.

28. *Tinker*, 393 U.S. at 508.

29. *Id.* at 518 (Black, J., dissenting).

30. *Morse*, 551 U.S. 393 at 417 (Thomas, J., concurring).

31. *Id.* at 405.

32. *Id.* at 422 (Thomas, J., concurring).

33. *Id.* at 418 (Thomas, J., concurring). *See* Klupinski, *supra* note 13, at 618 ("*Tinker* is generally hailed by scholars as the high water mark of student free speech, while the subsequent Supreme Court decisions are viewed as chipping away at students' First Amendment protections.").

34. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986).

35. *Id.* at 685-86.

manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[36]

Less than two years after *Fraser*, the Supreme Court created another exception to *Tinker* for school-sponsored activities in *Hazelwood School District v. Kuhlmeier*. When staff members of a high school newspaper sued the school for refusing to publish two of their articles, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[37] The Court attempted to distinguish *Kuhlmeier* from its precedent in stating, "[t]he question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[38]

In the Supreme Court's most recent student speech decision, *Morse v. Frederick*, school administrators punished a student for unfurling a large banner across the street from the school bearing the phrase "BONG HiTS 4 JESUS."[39] Because of the special characteristics of the school environment and the governmental interest in stopping student drug abuse, the Court held that schools are allowed to restrict student expression that may reasonably be regarded as promoting illegal drug use.[40]

Morse is relevant to the issue of student Internet speech because it was the first of the four decisions to "expand the disciplinary arm of the school beyond the physical schoolhouse gate."[41] The opinion illustrated that "a court must first resolve the issue of whether student expression falls within the authority of the school before determining whether it belongs in one of the four categories of speech that schools may control."[42] With regard to this first step, the Court responded to the student's argument that the case fell outside of the scope of existing student speech precedent by stating that he "cannot stand in the midst of his fellow students, during school hours, at a school-

36. *Id.* at 683.
37. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
38. *Id.* at 270-71.
39. Morse v. Frederick, 551 U.S. 393, 397 (2007).
40. *Id.* at 408.
41. Klupinski, *supra* note 13, at 625. *See also* Bradford, *supra* note 8, at 333.
42. Bradford, *supra* note 8, at 333.

sanctioned activity and claim that he is not at school."[43] While the Court did admit that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents," it declined to resolve that uncertainty in *Morse*.[44] As a result, the decision left lower courts to formulate their own tests because it "did not outline a method for determining how speech that occurs off campus can become school speech."[45]

As of today, *Morse* is the Supreme Court's "last word on student free speech."[46] While the legal community eagerly anticipated the *Morse* decision in hopes that it "would clarify prior Supreme Court precedent, the existing precedents' interrelationship, and the scope of each case," the Court's holding left commentators disappointed.[47] In the end, the standard created by the Supreme Court for regulating student speech can be characterized as follows:

> Students retain free speech rights in public schools as long as their speech does not amount to a "true threat," does not create a material and substantial disruption of school activities, or that schools can reasonably forecast as creating a substantial disruption, unless the student's speech was vulgar, lewd, or undermined the school's basic educational mission, or unless the speech is of an offensively sexual suggestive nature, or unless the speech is school sponsored and school officials' actions are reasonably related to legitimate pedagogical concerns, or unless the speech might reasonably be understood as bearing the imprimatur of the school itself, or unless the speech advocates illegal drug use.[48]

While none of the four Supreme Court cases involved speech that was clearly off-campus, the opinions contain a few contradictory statements on the issue.[49] On one hand, some cases have indicated that "off-campus speech receives greater protection than on-campus speech."[50] In *Fraser*, for example, the majority recognized that the gov-

43. *Morse*, 551 U.S. at 401.

44. *Id. See also* Miller, *supra* note 9, at 318.

45. Bradford, *supra* note 8, at 333.

46. Klupinski, *supra* note 13, at 622.

47. Hayes, *supra* note 7, at 255.

48. *Id.*

49. Waldman, *supra* note 10, at 617-18.

50. Goldman, *supra* note 10, at 410. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Blackmun, J., concurring) (The Supreme Court opinions confidently state throughout that if a student had delivered the same speech *outside* of the school environment, he could not have been penalized.); Morse v. Frederick, 551 U.S. 393, 434 (2007) (Stevens, J., dissenting) ("[T]he message on Frederick's banner is not necessarily protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere."); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 937 (3d Cir. 2011) (en banc) (Smith, J., concurring) ("Courts agree that *Fraser*, *Kuhlmeier*, and *Morse* apply solely to on-campus speech.").

ernment could not censor speech that is inconsistent with a school's basic educational mission outside of school.[51] In *Morse*, the Court reaffirmed this understanding: "'[h]ad Fraser delivered the same speech in a public forum outside the school context, he would have been protected.'"[52]

On the other hand, *Tinker* itself arguably indicated that its holding was intended to encompass off-campus speech when it stated, "conduct by the student, *in class or out of it*, which ... materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[53] While a student can still be on school property without being "in class," this statement may be "[t]he apparent basis for lower courts' applications of *Tinker*'s 'substantial disruption' standard to off-campus speech."[54]

In addition to this lack of clarity regarding the reach of the Court's holdings, the Court "left entirely open the question of what constitutes 'speech outside of school' – a question made much more complicated by the rise of the Internet, which undermines the notion of a physical on-campus/off-campus division."[55] As the concurrence in one of the subsequent circuit court decisions noted, "[f]or better or worse, wireless Internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech."[56] Because Internet use among teens in the U.S. today is nearly universal as a means of social interaction, "[t]he line between 'on-campus' and 'off-campus' speech is not as clear as it once was."[57]

As a result of this uncertainty regarding both the scope of the Supreme Court precedent and the distinction between on and off-campus speech, "[a]pplication of [the] four Supreme Court cases by lower courts has been inconsistent, particularly with regard to Internet

51. *Morse*, 551 U.S. at 404. *See* Waldman, *supra* note 10, at 618 ("The *Hazelwood* Court thus left unclear whether it was specifically limiting schools' authority over students' off-campus speech, or simply contrasting school authority over student speech to government authority over adult speech.").

52. *Morse*, 551 U.S. at 406.

53. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (emphasis added).

54. Goldman, *supra* note 10, at 410.

55. Waldman, *supra* note 10, at 618.

56. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 220-21 (3d Cir. 2011) (en banc) (Jordan, J., concurring).

57. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 951 (3d Cir. 2011) (en banc) (Fisher, J., dissenting).

speech."[58] Nonetheless, *Tinker* and its progeny raised a precise constitutional question: where does a student's speech "occur" when the Internet is used as a medium?[59] If the answer is "off-campus," does a school nevertheless have the authority to discipline a student for that speech?

II. THE CIRCUIT SPLIT

As a result of this lack of guidance from the Supreme Court,[60] federal circuit courts have split on the issue of how to apply the Court's precedents to online, off-campus speech.[61] The obscurity of the existing guidance allows courts to manipulate the Supreme Court precedents to achieve their desired result, leaving us with "as many different outcomes as there are jurisdictions."[62] While several believe applying *Tinker*'s "substantial disruption" test to student Internet speech is effective, "others believe it is the 'wrong tool' for the job."[63] Despite these conflicting opinions, *Tinker*'s substantial disruption rule has been widely utilized by lower courts when analyzing the permissibility of punishment for online speech.[64] The courts that do apply the first prong of *Tinker* generally try to find some connection between the student speech and the school campus.[65] Generally, if the court can find a "sufficient 'nexus' linking the speech to some disruption, or risk of disruption," the punishment has been upheld.[66] The problem, however, is that "different courts have had very different opinions about what constitutes a true disruption."[67] This section will elaborate upon the opposing perspectives regarding the applicability of *Tinker* and the struggle to define "substantial disruption." This section will then ex-

58. Klupinski, *supra* note 13, at 625.

59. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573 (4th Cir. 2011).

60. Samantha M. Levin, *School Districts as Weathermen: The School's Ability to Reasonably Forecast Substantial Disruption to the School Environment From Students' Online Speech*, 38 FORDHAM URB. L.J. 859, 860 (2011).

61. *Snyder*, 650 F.3d at 950 (en banc) (Fisher, J., dissenting) ("Our decision today causes a split with the Second Circuit.").

62. Hayes, *supra* note 7, at 286-87. *See* Bradford, *supra* note 8, at 339; Daniel, *supra* note 6, at 627 ("Not surprisingly, lower courts have differed in their most basic interpretations of [the *Tinker*] language . . . which has resulted in contradictory holdings.").

63. Hayes, *supra* note 7, at 284.

64. Bradford, *supra* note 8, at 333. *See* Hayward, *supra* note 15, at 111 ("Most courts confronted with this issue have applied the same legal standards as on-campus speech, which is to say, the 'substantial disruption' analysis of *Tinker*.").

65. Bradford, *supra* note 8, at 333-34.

66. *Id.*

67. *Id.*

plain why neither perspective provides the ideal approach to determining the constitutionality of disciplining students for Internet speech.

A. *Cases in Favor of the Student*

Courts that hold in favor of students find that Internet speech occurring off-campus *does* fall within constitutional protection, and thus is not subject to special treatment under First Amendment jurisprudence. These courts reach this result by reasoning that schools either have no authority over off-campus speech, or, in the alternative, that courts have authority to regulate off-campus speech under the *Tinker* substantial disruption test, but the test was not satisfied. Holdings for the students not only honor well-established First Amendment principles, but, by maintaining *Tinker*'s "schoolhouse gate" as the bright line rule, limit the authority of administrators and promote student speech.

The two existing circuit court opinions holding in favor of students were both decided by the Third Circuit. Initially, the Circuit issued opposite holdings in two almost factually identical cases - one in favor of the student and the other in favor of the school district.[68] Because these conflicting outcomes resulted in sharp criticism from the legal community, the entire fourteen-member Third Circuit sat, *en banc*, to hear oral arguments for each of the opinions. Upon this rehearing, the panel came out in favor of the respective student in each.

In *Snyder v. Blue Mountain School District*, the Third Circuit held for a middle school student who was disciplined for creating a MySpace profile of her principal.[69] The profile's contents ranged from "nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family."[70] After the principal requested that another student bring a printout of the profile to school, the creator, J.S., received a ten-day out-of-school suspension.[71]

Despite its adult language and sexually explicit content, the court determined that the speech caused no substantial disruption and could not reasonably have led school officials to forecast substantial disrup-

68. Levin, *supra* note 60, at 860.
69. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc).
70. *Id.*
71. *Id.* at 922.

tion in the school.[72] Therefore, the school district's actions violated J.S.'s First Amendment rights.[73] The court concluded by stating,

> Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school... [a]n opposite holding would significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship discretion.[74]

The school district has since filed a petition with the Supreme Court, which is currently pending review.[75]

In the other Third Circuit case, *Layshock v. Hermitage School District*, the court again held in favor of a student who created a fake MySpace profile mocking his high school principal.[76] The profile contained a photo of the principal and a series of derogatory comments aimed at his weight. After learning of the webpage, the principal suspended the creator, Justin Layshock, for ten days, placed him in an alternative education program, banned him from extracurricular activities, and forbid him from participating in the school's graduation ceremony.[77] Despite the fact that three other students posted even more vulgar and offensive profiles of the principal, Justin was the only student punished.[78] The court reasoned that because it would be "unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there," the First Amendment prohibited the school from imposing discipline.[79]

While holdings in favor of students have several well-grounded justifications, a "student-friendly" rule is ultimately too narrow to become the preferred treatment of online, off-campus speech. By essentially tying the hands of school administrators, this approach both threatens the learning environment and eliminates the deterrent effect

72. *Id.* at 920.

73. *Id.*

74. *Id.* at 933.

75. Lyle Denniston, *No clarity on religious displays*, SCOTUSblog (Oct. 31, 2011, 1:24 PM), http://www.scotusblog.com/2011/10/no-clarity-on-religious-displays/ ("The Court has not yet considered the other two cases on regulation by school officials of off-campus student remarks: *Kowalski v. Berkeley County Schools* (11-461) and *Blue Mountain School District v. J.S.* (11-502).").

76. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011) (en banc).

77. *Id.* at 210.

78. *Id.*

79. *Id.* at 216.

of discipline. This is especially problematic when schoolteachers and administrators might be the best-suited parties to impose punishment in the first place.

First, if courts do not allow the *Tinker* standard to govern Internet speech, administrators may be prohibited from disciplining students *even if* there is a substantial disruption or an invasion of the rights of others. Preventing Internet speech regulation may cause "infinite problems for school administrators attempting to maintain order and teach civility to young people."[80] The *Snyder* dissent expressed concern over this ramification: "I fear that our Court leaves schools defenseless to protect teachers and school officials against such attacks and powerless to discipline students for the consequences of their actions."[81] If the online speech, for example, specifically victimizes another student, commentators fear that prohibiting discipline "will 'create a climate of fear among targeted students, inhibit their ability to learn, and lead to other anti-social behavior' by the aggressors . . . The interests at stake – school safety and an inclusive learning environment – are far too important to jeopardize."[82]

In addition to impacting the offender and any potential victims, holding in favor of the students might also have a significant impact on other observing students. First and foremost, permitting unfavorable conduct would "demonstrate to the student body that this form of speech is acceptable behavior."[83] Neglecting to act in the face of online speech that is nonetheless disruptive or harmful sends a "powerful message to students about the school's resolve."[84] Thus, some sanction may be necessary in order to communicate to other students that such conduct will not be tolerated.[85]

Additionally, prohibiting punishment of disruptive or harmful Internet speech wholly eliminates the deterrent effect inherent in discipline. When we allow an administrator to punish a student for his or her online speech, it is not only for the sake of that particular speaker, but also to dissuade other students from making similar statements on

80. Hayes, *supra* note 7, at 288.

81. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 941 (3d Cir. 2011) (en banc) (Fisher, J., dissenting). *See also Layshock*, 650 F.3d at 222 (en banc) (Jordan, J., concurring) ("I worry that the combination of our decisions today in this case and in *J.S.* may send an 'anything goes' signal to students, faculties, and administrators of public schools.").

82. Daniel, *supra* note 6, at 635 (quoting OKLA. ST. ANN. 70 § 24-100.3 (2009)).

83. *Snyder*, 650 F.3d at 945 (en banc) (Fisher, J., dissenting).

84. Garcia, *supra* note 18, at 75.

85. Daniel, *supra* note 6, at 635.

the Internet. In *Tinker*, Justice Black expressed concern over this early on with respect to on-campus speech: "One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students... will be ready, able, and willing to defy their teachers on practically all orders."[86] Over forty years later, the *Kowalski* court echoed this same apprehension: "Experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in 'copycat' efforts by other students."[87] Thus, "[a]ny failure to restrict this type of speech or discipline its author would almost inevitably lead to more of the same."[88]

A final objection to holdings favoring students is that they undermine the rational discretion of administrators. By preventing school officials from imposing punishment, even in the face of disruptive or harmful speech, we are implicitly compelling any injured parties to pursue restitution through courts. The judicial system, however, enters the arena of school discipline with "great hesitation and reluctance."[89] As the dissent in *Morse* warned: "[N]o one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office."[90] Not only are school administrators physically present at the heart of the activity, they are "trained and paid to determine what form of punishment best addresses a particular student's transgression."[91] Because "[s]tudents will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges,"[92] schools are in a "far better position than is a black-robed judge to decide what to do with a disobedient child at school."[93] In his concurrence in *Layshock*, Judge Jordan agreed, stating, "[t]o the extent it appears we have undercut the reasoned discretion of administrators to exercise

86. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 525 (1969) (Black, J., dissenting).

87. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574 (4th Cir. 2011) ("[H]ad the school not intervened, the potential for continuing and more serious harassment of Shay N. as well as other students was real."). *See also Snyder*, 650 F.3d at 945 (en banc) (Fisher, J., dissenting).

88. Garcia, *supra* note 18, at 78.

89. Daniel, *supra* note 6, at 635. *See also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges.").

90. Morse v. Frederick, 551 U.S. 393, 428 (2007).

91. Daniel, *supra* note 6, at 635.

92. *Morse*, 551 U.S. at 428 (Breyer, J., concurring).

93. Daniel, *supra* note 6, at 635 ("They can best determine, for instance, whether a suspension or an after-school detention will be more effective in correcting a student's behavior.").

control over the school environment, we will not have served those affected by the quality of public education, which is to say everyone."[94]

The authority and logical discretion of administrators is particularly essential when the online speech creates a harmful or threatening situation that requires immediate on-campus action. When a school, for example, needs to "act quickly and suspend a student on an emergency basis to prevent potential harm while an investigation is undertaken," resorting to the prolonged processes of the judicial system would be entirely futile.[95] Rather than instilling a fear of judicial liability in every school administrator, these critics argue that they should be granted wide discretion in disciplining off-campus, Internet speech.[96]

B. Cases in Favor of the School

To the contrary, "school-friendly" courts hold that regardless of whether online speech occurs on or off-campus, it is still subject to the First Amendment rules laid out by the Supreme Court precedent. The majority of these cases hold in favor of school administrators by applying *Tinker* and finding that a substantial disruption existed. Even though the existence of a substantial disruption in some of these cases is dubious at times,[97] holding for the school effectively grants administrators the requisite flexibility to punish certain online expressions, thereby maintaining a stable learning environment while effectively conveying the school's stance regarding the permissible extent of online speech.

In *Wisniewski v. Board of Education of the Weedsport Central School District*, the Second Circuit held in favor of a school that disciplined eighth grader Aaron Wisniewski after he shared an instant message icon suggesting that his English teacher be killed.[98] The icon was a small drawing of a pistol firing a bullet at a person's head, accompanied by dots representing spattered blood and the message, "Kill Mr. VanderMolen."[99] When school administrators learned of the icon -

94. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 222 (3d Cir. 2011) (en banc) (Jordan, J., concurring).

95. Garcia, *supra* note 18, at 71.

96. Daniel, *supra* note 6, at 635.

97. Hayward, *supra* note 15, at 108.

98. Wisniewski v. Bd. of Educ. of Weedsport Ctr. Sch. Dist., 494 F.3d 34, 35 (2d Cir. 2007).

99. *Id.* at 36.

which was viewable by fifteen members of Aaron's "buddy list" over the course of three weeks – they suspended him for a semester.[100]

In its holding, the Second Circuit applied *Tinker*'s standard in concluding that Aaron's speech "crosse[d] the boundary of protected speech and constitute[d] student conduct that pose[d] a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'"[101] The court further stated: "The fact that Aaron's creation and transmission of the [instant message] icon occurred away from school property does not necessarily insulate him from school discipline."[102]

One year later, in *Doninger v. Niehoff*, the Second Circuit again held in favor of administrators who disciplined a high school junior, Avery Doninger, for a "vulgar and misleading" blog post about the supposed cancellation of an upcoming school event.[103] Upset over the repetitive delays of an event she was planning as a member of the school's Student Council, Avery's message referred to the administrators as "douchebags" and encouraged readers to contact one of the defendants to "piss her off more."[104] Several students added comments to the blog, including one which referred to the same defendant as a "dirty whore."[105]

In its reasoning, the Second Circuit acknowledged that "[t]he Supreme Court has yet to speak on the scope of a school's authority to regulate expression that . . . does not occur on school grounds."[106] Nevertheless, the Second Circuit held that a student may be disciplined for *off-campus* conduct if it was foreseeable that the expression would reach campus and "create a risk of substantial disruption within the school environment."[107] Because the court deemed these requirements satisfied, punishing Avery by refusing to allow her to take office as Senior Class Secretary was permissible.[108] Although Doninger ap-

100. *Id.*
101. *Id.* at 38-39.
102. *Id.* at 39.
103. Doninger v. Niehoff, 527 F.3d 41, 43-45 (2d Cir. 2008).
104. *Id.*
105. *Id.*
106. *Id.* at 48-49 ("If Avery had distributed her electronic posting as a handbill on school grounds, this case would fall squarely within the Supreme Court's precedents.").
107. *Id.*
108. *Id.* at 43-45.

pealed the issue to the Supreme Court, the Court recently denied review.[109]

In 2011, the Fourth Circuit followed *Doninger*'s lead with its decision in *Kowalski v. Berkeley County Schools.* When high school senior Kara Kowalski created a MySpace posting largely dedicated to ridiculing another student, the court upheld the school's punishment.[110] The heading of the page was allegedly an acronym for "Students Against Shay's Herpes," referring to a fellow student, Shay N., who was the main topic of discussion on the site.[111] When Shay's parents notified the school, the administrators imposed a five-day out-of-school suspension and a 90-day social suspension, thereby forbidding Kowalski from attending school events.[112]

The court reasoned that while Kowalski "pushed her computer's keys in her home," she knew the fallout from her conduct would be felt beyond, so the "reasonably foreseeable substantial disruption" test was satisfied.[113] Following a discussion of the phenomenon of student harassment and bullying, the court concluded that, "where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem."[114] While the court proposed that "[t]here is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate,"[115] it declined to specifically address that issue on *Kowalski*'s facts. Kowalksi has since filed a petition with the Supreme Court, which is currently pending review alongside *Snyder.*[116]

Finally, in *D.J.M. v. Hannibal Public School District,* the most recent online, off-campus student speech decision, the Eighth Circuit held in favor of a school who suspended tenth grade student, D.J.M., after he

109. Denniston, *supra* note 75 ("[T]he Court denied review of the first case seeking to test whether public school officials have the authority to discipline students for offensive remarks that they make in Internet postings, written on the students' computers while they were at home. The issue has been raised in three petitions before the Court this Term. The Court refused to hear the first – *Doninger v. Niehoff, et al.* (docket 11-113).").

110. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567 (4th Cir. 2011).

111. *Id.*

112. *Id.* at 569.

113. *Id.* at 573 ("[H]ad Kowalski created the 'S.A.S.H.' group during school hours, using a school-provided computer and Internet connection, this case would be more clear-cut.").

114. *Id.* at 577.

115. *Id.* at 573.

116. Denniston, *supra* note 75 ("The Court has not yet considered the other two cases on regulation by school officials of off-campus student remarks: *Kowalski v. Berkeley County Schools* (11-461) and *Blue Mountain School District v. J.S.* (11-502).").

sent instant messages from his home computer to a classmate about shooting other students at the school.[117] After discussing his frustration at having been recently spurned by a romantic interest, D.J.M. stated that he would let her live but would shoot "everyone else" with his friend's "357 magnum."[118] He then went on to name specific students he would "have to get rid of," including some individual members of groups he did not like.[119] At several points in the conversation, both students expressed amusement at the prospect of shooting particular individuals by saying things like, "haha" and "lol."[120] After the other student emailed excerpts of the conversation to the school's principal, D.J.M. was suspended for the rest of the school year.[121]

In it's reasoning, the court applied two alternative rationales in deciding that D.J.M.'s online speech was not protected.[122] The first approach centered on D.J.M.'s statements as "true threats," defined as "statement[s] that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another."[123] Because of the school's obligation to ensure the safety of its students, combined with its concern created by shooting deaths at other schools, the court reasoned that the school did not violate the First Amendment in disciplining D.J.M.[124] In addition to the "true threat" analysis, the court's second approach applied *Tinker*, holding that "it was reasonably foreseeable that D.J.M.'s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption."[125]

While holdings favoring schools avoid the aforementioned consequences of student-friendly holdings by extending *Tinker* and its progeny to student Internet speech, this approach is also not optimal because it is too broad.[126] As the dissent in *Kuhlmeier* cautioned: "'[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fun-

117. D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 756-57 (8th Cir. 2011).

118. *Id.* at 758 (internal quotation marks omitted).

119. *Id.* (internal quotation marks omitted).

120. *Id.* (internal quotation marks omitted).

121. *Id.* at 759.

122. *Id.* at 761.

123. *Id.* at 762 (quoting Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002) (en banc)) (internal quotation marks omitted).

124. *Id.* at 764.

125. *Id.* at 766.

126. Goldman, *supra* note 10, at 408 ("The problem with the 'substantial disruption' test as applied to off-campus speech . . . is that it covers too much.").

damental personal liberties when the end can be more narrowly achieved."[127] Not only does holding for schools further encroach upon time-honored First Amendment principles, but by eliminating the "schoolhouse gate" as the bright line rule, it grants extensive authority to school officials and chills student speech.

To begin, allowing discipline only further encroaches on the liberties the First Amendment was designed to protect by extending the muzzle on free speech beyond the schoolhouse gate. Our longstanding First Amendment jurisprudence teaches us that, absent strong rationale, this invasion should be avoided rather than endorsed. Decades ago, Justice Brennan's dissent in *Kuhlmeier* cautioned that, "the Court today 'teaches youth to discount important principles of our government as mere platitudes.'"[128] Instead, he warned, we should be demonstrating that "our Constitution is a living reality, not a parchment preserved under glass."[129] In spite of his criticism, "[d]octrinal analysis and a close reading of recent student speech cases . . . demonstrate the erosion of sound precedent through the continued expansion of a school's disciplinary jurisdiction over online speech."[130] This recent "expanded assertion of school jurisdiction beyond the schoolhouse gate undermines core First Amendment rights and values by restricting students' speech rights."[131] Because "our schools ought to inculcate respect and appreciation for free speech and diverse opinions, the bedrocks of freedom in a democratic society," we should refrain from "clamping down on student expression."[132] As a result of these longstanding goals, some commentators argue that, absent direction for the Supreme Court, "lower courts and schools should step lightly in using existing Supreme Court precedent to discipline students."[133]

In general, cases holding for schools stress that utilizing the "schoolhouse gate" as the bright line rule is fruitless when the speech occurs online. The majority in *Doninger*, for example, quoted precedent

127. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 289 (1988) (Brennan, J., dissenting).

128. *Id.* at 291 (Brennan, J., dissenting) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 637 (1943)) (internal quotation marks omitted).

129. *Id.* (Brennan, J., dissenting) (quoting Shanley v. Ne. Indep. Sch. Dist., Bexar Cty., Tex., 462 F.2d 960, 972 (5th Cir. 1972)) (internal quotation marks omitted).

130. Tomain, *supra* note 14, at 99. *See also* Hayward, *supra* note 15, at 109-10 ("[S]ome legal analysts have justifiably been concerned that off-campus student speech has come under increasing attack so that free speech rights are endangered.").

131. *Tomain, supra* note 14, at 99.

132. Hayward, *supra* note 15, at 124.

133. Miller, *supra* note 9, at 331 ("Because the Supreme Court has not defined the scope of a school's authority to discipline a student's online and off-campus speech, lower courts and schools should step lightly in using existing Supreme Court precedent to discipline students.").

stating that "'territoriality is not necessarily a useful concept in determining the limit of school administrators' authority... when students both on and off campus routinely participate in school affairs... via blog postings, instant messaging, and other forms of electronic communication.'"[134] Despite the truth of this assertion, there are evident problems inherent in applying *Tinker* to Internet cases. Doing so would likely "open the floodgates" for school administrators to discipline speech, regardless of time and place, as long as it substantially disrupts the school environment or invades the rights of others.[135] For some, the mere thought of a school policing within a student's home is "more than a little troubling."[136] This is not to mention that school officials may not be realistically capable of enforcing all student expressions regardless of where they commence. "Trying to resolve all cases of hurt feelings, whether generated on or off campus, would open up a Pandora's box of problems for school administrators."[137]

Granting extensive authority to administrators necessarily reserves less authority for the parents of the offending children, invading their right to raise their children as they wish.[138] The Supreme Court has expressed that parental rights are fundamental under the Fourteenth Amendment and "should not be interfered with absent special circumstances."[139] Because "[p]arents know their children better than anyone and have the greatest ability and interest in teaching appropriate behavior... parents should be able to determine which interest should prevail when their child is under their supervision."[140] Thus, punishment for off-campus speech should arguably be left to a student's parents.[141] In the end, a "school-friendly" rule would essentially allow administrators to act as "roving inspectors of decency, encroaching on familial and individual prerogatives."[142]

The final and inevitable ramification of eliminating the schoolhouse gate as the bright line rule is that it will chill student speech. Without the establishment of a clear rule, a student who is uncertain

134. Doninger v. Niehoff, 527 F.3d 41, 48-49 (2d Cir. 2008) (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1058 (2d Cir. 1979)).

135. Hayes, *supra* note 7, at 285-86.

136. Goldman, *supra* note 10, at 409.

137. *Id.* at 416.

138. Tomain, *supra* note 14, at 110 ("[An] extension of jurisdiction... violates parents' rights to raise their children as they believe proper.").

139. Goldman, *supra* note 10, at 415-16.

140. *Id.*

141. *Id.*

142. Waldman, *supra* note 10, at 654.

about the permissibility of his or her online speech may ultimately choose to "remain silent for fear of violating the law."[143] Thus, regardless of whether the speech is "political speech or merely offensive, juvenile humor," shielding Internet speech from discipline is essential to avoid this chilling effect.[144] These arguments apply with added force in the Internet speech context due to the functioning of *Tinker*'s substantial disruption standard. Because the presence or absence of disruption necessarily relies, not upon the actions of the speaker himself, but on the reactions of *others*, "no student, even in the privacy of his or her own home, can write about controversial topics of concern to them without worrying that is may be 'disruptive' .... In effect, students will be punished for off-campus speech based on the way people react to it at school."[145] Thus, application of the *Tinker* rules do not "simply 'chill' student free speech, they plunge it into deep freeze."[146]

III. A COMPROMISE APPROACH

The current circuit split not only draws attention to the increasing uncertainty regarding the constitutionality of punishing students for online, off-campus speech, but also calls for a compromise approach that will simultaneously promote the rights of students and the interests of school administrators. The following position attempts to achieve this careful balance by asking (1) if the speech "invades the rights of others" as a form of cyberbullying; and (2) if so, whether the victim of the bullying is an adult administrator or a fellow student of the offender. This method might not provide a perfect bright line rule for teachers and administrators by entirely permitting or entirely prohibiting discipline by the school. Nonetheless, it does provide a stable middle ground on which both schools and courts can distinguish between punishments that are and are not constitutionally permissible.

A. Cyberbullying

Courts should first and foremost begin their analysis of permissible punishment by drawing a distinction between "cyberbullying" and other forms of expression. Because cyberbullying is markedly different from the political speech *Tinker* was aiming to protect, schools should

143. Bradford, *supra* note 8, at 356.
144. Tomain, *supra* note 14, at 106.
145. Hayward, *supra* note 15, at 91.
146. *Id.* at 92.

not be permitted to discipline students for off-campus speech unless the student made the communication with the intent of attacking or threatening another person.[147]

The relatively recent phenomenon of cyberbullying has been defined as "the use of modern communications technology to harass, psychologically attack, or threaten another" through, for example, "the spreading of lies or attacking someone on the basis of one's core characteristics with the intent to cause psychological harm and to disrupt one's life activities."[148] Because preteens and teenagers are among the most common offenders, the ramifications of cyberbullying are often exhibited in the school setting, regardless of whether the expressions originate from an off-campus computer.[149] The ordinary cyberbully "intends to communicate the message to both the target and to third persons" and "[t]he message is intended to be harmful and to interfere with the targeted student's functioning."[150]

Cyberbullying is more severe than traditional forms of on-campus bullying for a number of reasons. First, its content travels faster and is more pervasive because it is communicated via the Internet. Because electronic communication technology has developed at a light-speed pace, it is now "possible for cyberbullies to send messages much more quickly, and to much wider audiences."[151] While traditional bullying tactics "confined the victimization to mostly face-to-face interactions, the Internet now allows cyberbullies to reach their intended targets all day, every day."[152] Cyberbullying is also distinct from traditional bullying because of the potential power of anonymity. Because cyberbullies are capable of hiding their identities, the "veil of secrecy allows cyberbullies to communicate aggressive and hurtful comments that they might not otherwise communicate in person."[153] A final distinction concerns the distance between the bully and the victim because it both incentivizes the bully and desensitizes bystanders.[154] Cyberbullies,

147. While the definition of cyberbullying in any context is obviously somewhat flexible, school teachers and administrators should use their reasoned discretion in determining whether the speech at issue truly fits the cyberbullying mold, distinguishing harassing speech from political speech.

148. Elizabeth M. Jaffe & Robert J. D'Agostino, *Bullying in Public Schools: The Intersection Between the Student's Free Speech Rights and the School's Duty to Protect*, 62 MERCER L. REV. 407, 441 (2010-2011).

149. *Id.*

150. *Id.* at 443.

151. Daniel, *supra* note 6, at 624.

152. *Id.*

153. *Id.*

154. *Id.*

"operat[ing] from behind their electronic devices . . . rarely witness the effect of their actions on their victims, enabling them to pitch derogatory and hurtful language at their victims while simultaneously laughing off their behavior as inconsequential."[155]

Because of its negative impact on both the school environment and on the victims themselves, off-campus cyberbullying should be treated differently than other forms of expression. Cyberbullying can first and foremost result in "a wide range of psychological harm."[156] Victims may suffer "low self-esteem, anxiety, depression, or social withdrawal," which can lead to "increased difficulty concentrating, stress, [and] truancy."[157] This may eventually inhibit the victim's learning experience, denying educational opportunities to him or her.[158] Ultimately, cyberbullying can have more serious and long-term effects on a victim, ranging from depression and negative self-concept, to the ultimate self-sacrifice of suicide.[159]

While suicide is without doubt the most extreme ramification of cyberbullying, it is unfortunately a reality in our society. For example, thirteen year-old Megan Meier committed suicide in 2006 because of postings on MySpace saying she was a "bad person whom everyone hated and the world would be better off without."[160] Then again in 2010, fifteen-year old Phoebe Prince hung herself after almost three months of routine harassment via Facebook and text messages "designed to humiliate her and to make it impossible for her to remain at school."[161] These are not isolated incidents. Rather, numerous other documented occurrences seem to indicate that suicide as a result of cyberbullying is on the rise.[162]

These alarming effects of cyberbullying argue in favor of the potential justification and legitimacy of discipline by schools in certain situations. As mentioned above, courts tend to apply *Tinker*'s substantial disruption prong as a default in student speech cases, while notice-

155. *Id.*

156. Goldman, *supra* note 10, at 414.

157. *Id.*

158. Daniel, *supra* note 6, at 623.

159. Goldman, *supra* note 10, at 414. *See* Daniel, *supra* note 6, at 620 ("The effects of cyberbullying on a victim range from a measureable downturn in educational achievement, to emotional distress so egregious as to rise to the level of psychological or psychiatric harm, to the final choice of suicide as a way of escaping the torment.").

160. Hayward, *supra* note 15, at 86.

161. Thomas Wheeler, *Facebook Fatalities: Students, Social Networking, and the First Amendment*, 31 PACE L. REV. 182, 182 (2011).

162. *Id.* at 183.

ably ignoring the second prong—"speech that invades the rights of others."[163] Indeed, some legal scholars accuse the courts of paying "too little attention to the second prong of *Tinker*."[164] Thus, even without the substantial disruption prong, schools may still have authority to regulate cyberbullying if it is somehow invasive of another's rights. While *Tinker*'s substantial disruption test may be effective in the on-campus context, asking whether a particular communication invades the rights of others might be a more suitable test to apply when discussing online speech.

Applying this first proposed rule to the current circuit court cases is illustrative. Of the expressions discussed in each, Avery Doninger's blog post protesting the cancellation of her event is the least likely to meet the definition of "cyberbullying" because her statements were not likely made with the intent of attacking or threatening another person. While Avery referred generally to the administrators as "douchebags" and created the post to persuade others to harass them, her overriding intent was arguably to express her dissatisfaction with the event's cancellation and to recruit others to protest alongside her. Regardless of the fact that the post was "vulgar and misleading," her speech was more akin to the "political speech" the *Tinker* Court was expressly aiming to protect.[165] If we restrict students from making such statements "to the point where [they] cannot express frustration or disagreement with what is happening at school even when they use their own computer at home," we are only "rais[ing] the specter of limitless school authority."[166]

Kowalski, on the other hand, lies at the opposite end of the cyberbullying spectrum with facts sharply contrasting those of *Doninger*. There, the MySpace page Kowalski created "functioned as a platform for Kowalski and her friends to direct verbal attacks toward classmate Shay N."[167] Not only did the site contain "comments accusing Shay N. of having herpes and being a 'slut,'" but also "photographs reinforcing those defamatory accusations by depicting a sign across her pelvic area, which stated, 'Warning: Enter at your own risk' and labeling her portrait as that of a 'whore.'"[168] In light of this sinister yet senseless attack on a fellow student, the Fourth Circuit rightly concluded, "[t]his

163. Daniel, *supra* note 6, at 632.
164. *Id.* at 631.
165. Doninger v. Niehoff, 527 F.3d 41, 43 (2d Cir. 2008).
166. Waldman, *supra* note 10, at 592.
167. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 572-73 (4th Cir. 2011).
168. *Id.* at 573.

is not the conduct and speech that our educational system is required to tolerate."[169]

B. *Victims: The Student-Administrator Distinction*

Once a court decides that a school does have authority to regulate the expression because it qualifies as cyberbullying, the court should consider whether the victim at issue is a student or administrator. Because intentionally attacking a fellow peer is markedly different from attacking an adult, a court should be more inclined to allow discipline if the victim of the bullying tactics is a student.

First and foremost, adults are more mature and thus better able to handle the effects of cyberbullying, whereas cyberbullying is especially hazardous for children. Cyberbullying can have a "dangerous emotional impact... on school-aged victims, as opposed to adult teachers or administrators."[170] Furthermore, "[t]he maturity levels of students make them particularly susceptible to the harms from bullying"[171] while "school personnel are expected to be more mature than the students whom they teach."[172] Thus, "because student victims present unique problems and tragic consequences, they should take precedence in school policy and enforcement."[173]

This proposed refinement, however, does not leave adult administrators without any form of recourse. "School administration and staff... maintain the same protections against private Internet speech that belongs to any other professional."[174] As an additional justification for the student-administrator distinction, it is clear that there is at least some danger inherent in placing the determination of the permissibility and extent of discipline in the hands of an administrator who has been attacked.[175] In light of this innate risk, a court is likely the more appropriate, and undoubtedly the more neutral body to determine whether a student's online cyberbullying of a school official is protected under the First Amendment.[176] "[G]iving school officials broad

169. *Id.*
170. Daniel, *supra* note 6, at 633.
171. Goldman, *supra* note 10, at 414-15.
172. Bradford, *supra* note 8, at 345.
173. Daniel, *supra* note 6, at 633.
174. Bradford, *supra* note 8, at 344.
175. *Id.* at 345.
176. *Id.* ("Courts are better suited for determining whether speech is criminal or unprotected by the First Amendment, especially considering that if administrators are left to make their own determination... they are often left judging speech that is directed at them.").

power to censor speech that personally attacks them raises particular questions about the suppression of student dissent."[177]

Moreover, this proposal may be doctrinally rational based on the *Tinker* Court's description of the "rights of others" prong as the "right[] of other students to be secure and to be let alone."[178] If the *Tinker* Court did intend for this prong to extend only to fellow students, "teacher victims [would] fall entirely outside the focus of that portion of the test."[179] Thus, under this rationale, "adult employees of the school system may not have any extra rights created by the 'special characteristics' of the school setting."[180]

The victims in the circuit court cases consisted of both students and administrators. In both *Snyder* and *Layshock*, the students created fake MySpace profiles of their respective principals. In response to the student-created MySpace profile in *Snyder*, the principal told others he was "upset and angry, and threatened the children and their families with legal action."[181] Although the principal in that case did not follow through with the pursuit of criminal charges, a state police officer summoned the students and their parents to the station to discuss the profile and "let them know how serious the situation was."[182] Although the principal in *Layshock* also complained to the local police about whether the profiles amounted to "harassment, defamation, or slander," he likewise chose not to press charges.[183] Instead, after admitting his belief that the profiles were "degrading, demeaning, demoralizing, and shocking," the principal proceeded to impose a punishment that was both disproportionate and inconsistent.[184] The principal chose to suspend Justin for ten days, place him in an alternative education program, ban him from extracurricular activities, and forbid him from participating in the graduation ceremony – all the while wholly neglecting to punish three other students who created even more vulgar and offensive profiles than Justin's.[185] The facts of *Layshock* unquestionably demonstrate the severity of placing authority in an attacked administrator's hands at the height of his or her emotional response.

177. Waldman, *supra* note 10, at 592.
178. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).
179. Daniel, *supra* note 6, at 633.
180. Bradford, *supra* note 8, at 344.
181. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 922 (3d Cir. 2011) (en banc).
182. *Id.*
183. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 at 209 (3d Cir. 2011) (en banc).
184. *Id.*
185. *Id.* at 210.

CONCLUSION

The present circuit split on the constitutional permissibility of disciplining online, off-campus student speech requires a careful solution that is able to balance longstanding First Amendment principles with the interests of school administrators. The proposed compromise position satisfies this balancing test and thus, should be considered the preferred approach in all future cases involving online student expression.